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No. 384.

Brief of Bishop for D. E.

IN THE SUPREME COURT OF THE UNITED STATES.

Filed Dec. 4, 1899.

OCTOBER TERM, 1899.

No. 384.

CHARLES L. MAXWELL, PLAINTIFF IN ERROR,

vs.

GEORGE N. DOW, AS WARDEN OF THE UTAH STATE PRISON, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF UTAH.

ALEXANDER C. BISHOP,
Attorney General,

WILLIAM A. LEE,
Deputy Attorney General,
For Defendant in Error.

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IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

CHARLES L. MAXWELL,
Plaintiff in Error,
vs.
GEORGE N. DOW, as Warden of the Utah State Prison,
Defendant in Error.

No. 384.

BRIEF OF DEFENDANT IN ERROR.

STATEMENT.

This case was originally commenced in the Supreme Court of the State of Utah. The plaintiff in error filed a petition for a writ of habeas corpus, alleging that he was unlawfully imprisoned and restrained of his liberty by the defendant in error, for the following reasons:

1. Holding him to answer for the crime of robbery, except on a presentment or indictment of a grand jury, abridges his privileges and immunities as a citizen of the United States as guaranteed by Art. 5 of the amendments to the Constitution of the United States.

2. Trying him by a pretended jury of only eight persons abridges his privileges and immunities as a citizen of the United States as guaranteed by Art. 6 of the amendments to the Constitution of the United States.

3. That a trial of said petitioner by a pretended jury of only eight persons, and upon a verdict of guilty by said persons, imprisoning him in the said prison, is depriving him of his liberty without due process of law, and is in violation of his rights as guaranteed by Sec. 1 of Art. 14 of the amendments to the Constitution of the United States.

4. That Sec. 10 of Art. 1 and Sec. 13 of Art. 1 of the Constitution of the State of Utah, compelling him to be tried for a felony, except by a jury composed by twelve persons, and holding him to answer for a charge of felony, to-wit: robbery, except upon a presentment or indictment of a grand jury, abridge his privileges and immunities as a citizen of the United States; said Sec. 10,

compelling him to be tried by only eight persons instead of a jury, deprives him of his liberty without due process of law: and said sections are in contravention of Sec. 1 of Art. 14 of the amendments to the Constitution of the United States.

In the return made by the defendant in error, it is alleged that the detention of the said plaintiff in error is under authority and by virtue of the judgment and commitment complained of, and that the said detention is not in any manner illegal or unlawful; and that the matters and things alleged in said petition are not sufficient in law, and do not constitute any reason in law why said plaintiff should be discharged.

Upon the issues thus formed, the case was duly argued and submitted at the May term, 1899, and on the first day of June thereafter, the said court rendered its decision therein, to the effect that the writ of habeas corpus as prayed for, be denied; whereupon the plaintiff brings the case to this court upon writ of error to the Supreme Court of Utah.

In the petition of the plaintiff in error, the following errors are assigned and complained of:

1. The said court erred in upholding the validity of Sec. 10 of Art. 1 of the Constitution and laws of the State of Utah, providing that a

jury for the trial of felonies should be composed of eight persons only, in cases not capital.

2. The said court erred in deciding that trying the plaintiff herein upon a charge of robbery, which by the laws of the State of Utah is a felony, and upon a verdict of guilty, imprisoning him in the penitentiary for eighteen years, is not depriving him of his liberty "without due process of law."

3. The said court erred in deciding that said Sec. 10 of Art. 1 of the Constitution of the State of Utah, and the laws of the State made in pursuance thereof, do not abridge plaintiff's privileges and immunities as a citizen of the United States as guaranteed to him by the sixth and fourteenth amendments to the Constitution of the United States.

4. The said court erred in deciding that in holding the plaintiff to answer to a charge of robbery, unless upon a presentment or indictment of a grand jury, does not abridge his privileges and immunities as a citizen of the United States as guaranteed by the fifth and fourteenth amendments to the Constitution of the United States.

5. The said court erred in deciding that plaintiff was not entitled to be discharged from his imprisonment.

INTRODUCTORY.

For the first time in its history, this court is called upon to determine whether or not a State, by constitutional provision, can reduce a trial jury to a number less than twelve in felony cases, without infringing the provisions of the Federal Constitution.

Since the admission of the State of Utah into the Union, all prosecutions for felonies, except capital cases, have been tried by a jury of eight persons.

Of the one hundred and fifty-eight prisoners now confined in the State Prison of this State, one hundred and thirty-three are held under judgments of conviction similar to that of the plaintiff in error, all of which must, of necessity, abide the decision in this case. It is therefore a matter of grave importance to the State of Utah, affecting as it does both public and private rights and interests of great magnitude. The question is also one of profound interest and far reaching importance in its bearing upon the relations of the United States and of the several States to each other and to the citizens of the States and the United States.

While the serious consequences which will

result in sustaining the contention of the plaintiff in error are not, of themselves, sufficient reasons for upholding the validity of a provision of a state constitution which otherwise might deprive a person of his liberty without due process of law, or deprive him of substantial rights as a citizen of a State or of the United States, it is a reason so grave, and the results that must follow such a holding are of such paramount importance, as to command the most earnest consideration and serious thought.

Before proceeding to the argument of this case, it may be well to state our position with reference to the questions involved, and the theory upon which we shall present them to this court.

1. Prior to the adoption of the fourteenth amendment, courts had universally held the first eleven amendments of the Constitution to be limitations upon Federal power only, and not limitations upon the powers of a State.

2. The right guaranteed by the fifth amendment to the Constitution of the United States, that no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury; and the right guaranteed by the sixth amendment, that in all criminal prosecutions the accused shall enjoy

the right to a speedy and public trial by an impartial jury of the State or district wherein the crime shall have been committed, are not privileges or immunities of national citizenship, which the States are forbidden by the fourteenth amendment to abridge.

3. That Sec. 10 of Art. 1 of the Constitution of the State of Utah, which provides that in courts of general jurisdiction, except in capital cases, a jury shall consist of eight jurors, does not infringe that clause of the fourteenth amendment to the Constitution of the United States relating to "due process of law."

ARGUMENT.

I.

Prior to the adoption of the fourteenth amendment, courts had universally held the first eleven amendments of the Constitution to be limitations upon Federal power only, and not limitations upon the power of a state.

In support of the above proposition, it is sufficient to cite the decisions of this court, beginning as far back as 1833, and numerous decisions following which have unequivocally adhered to that holding.

Barron v. Baltimore, 7 Pet., 247.

Livingstone v. Moore, 7 Pet., 551.
Holmes v. Jennison, 14 Pet., 540.
Fox v. Ohio, 5 How., 434.
Smith v. Maryland, 18 How., 71.
Pervear v. Commonwealth, 5 Wall., 475.
Twitchell v. Commonwealth, 7 Wall., 326.
Justices v. Murray, 9 Wall., 274.

It may be of interest to refer to some of the decisions of the state courts in which the same doctrine has been announced.

Buonaparte v. Camden and Amboy R. R., Baldw., 220.
James v. Commonwealth, 12 S. and R. 220.
Barker v. People, 3 Cow., 686.
Colt v. Eves, 12 Conn., 243.
Jane v. Commonwealth, 3 Met. (Ky.), 18.
Lincoln v. Smith, 27 Vt., 328.
Matter of Smith, 10 Wend., 449.
State v. Barnett, 3 Kan., 250.
Reed v. Rice, 2 J. J. Marsh, 45.
S. C. 19 Am. Dec., 122.
North. Mo. R. R. Co. v. Maguire, 49 Mo., 490.
Lake Erie R. R. Co. v. Heath, 9 Ind., 558.
Prescott v. State, 19 Ohio St., 184.

State v. Shumpert, 1 So. Car., 85.
Commonwealth v. Hitchings, 5 Gray, 482.
Bigelow v. Bigelow, 120 Mass., 320.
Boyd v. Ellis, 11 Iowa, 97.
Campbell v. State, 11 Ga., 353.
State v. Carro, 26 La., Ann. 377.

II.

The right guaranteed by the fifth amendment to the Constitution of the United States, that no person shall be held to answer for a capital of otherwise infamous crime unless on a presentment or indictment of a grand jury; and the right guaranteed by the sixth amendment, that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state or district wherein the crime shall have been committed, are not privileges or immunities of national citizenship, which the States are forbidden by the fourteenth amendment to abridge.

In the consideration of constitutional provisions, and especially amendments to the original instrument, it is always of great assistance in determining their meaning to ascertain the reason for their adoption. With a view of throwing light upon the construction to be placed upon the con-

stitutional amendments under consideration, and particularly the fourteenth amendment, the substance of a brief history of their purpose and of the events leading up to their adoption, as admirably set forth by Mr. Justice Miller in Slaughter House cases, 16 Wall., 36, may here be given.

The first twelve articles of amendment to the Federal Constitution were added so soon after the organization of the government as to make them practically contemporaneous with the adoption of the instrument itself. No further amendments were made until between 1865 and 1869, when the thirteenth, fourteenth and fifteenth articles were added. The most cursory glance at these articles, when taken in connection with the history of the times, discloses the primary object of their adoption, and reflects much light upon questions of doubt as to their true meaning.

On account of African slavery, which had existed since before the organization of the government, and which had been recognized by the Constitution as a part of our institutions, the war of the Rebellion was brought on. For whatever auxiliary causes may have contributed to this result, the over-shadowing cause was human slavery. In that struggle slavery, as a legalized social

institution, perished by reason of the bitterness and force of that conflict. At the close of the war, when Federal authority had been re-established over the rebellious States, those in authority decided to incorporate into the supreme law of the land such amendments as would forever secure the results of the war, and guarantee to the emancipated freeman, equal rights to protection with his white brother.

It will not be contended for a moment that these provisions of the Constitution apply only to the colored man, for the language is general and broad enough, and was intended to apply alike to all citizens and subjects of the Federal government. That the primary and principal purpose of their adoption was designed to secure to the colored race the enjoyment of all the civil rights enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the States, cannot be doubted.

The statesmen of the Nation have always divided on the line which separates the powers of the National Government from those of the State government, and the adoption of the first eleven amendments to the Constitution shows a prevailing sense of danger at that time from the encroach-

ment of Federal power, notwithstanding all the pressure growing out of the existing feeling during the war; and our greatest statesmen still believe that the existence of States with powers for domestic and local government, including the regulation of civil rights, the rights of persons and of property are an essential part of our complex form of government.

In discussing the amendments to the Constitution of the United States, and the rule of construction applicable thereto, Mr. Cooley, in his work on Constitutional Limitations, (5th Ed.) Chap. 2, p. 26; star p. 19, says:

> "The tenth amendment to the Constitution provides that the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people. And it is to be observed of this instrument, that being framed for the establishment of a national government, it is a settled rule of construction that the limitations it imposes upon the powers of government are in all cases to be understood as limitations upon the government of the Union only, except where the States are expressly mentioned. As illustrations, the sixth and seventh amendments to the Constitution may be mentioned. These

> constitute a guarantee of the right of trial by jury, but as they do not mention the States, they are not to be understood as restricting their powers; and the States may, if they choose, provide for the trial of all offenses against the states, as well as for the trial of civil cases in the state courts, without the intervention of a jury, or by some different jury from that known to the common law. (Citing.)
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> Twitchell v. Commonwealth, 7 Wall., 321.
> Justices v. Murray, 9 Wall., 274.
> Edwards v. Elliot, 21 Wall., 532.
> Walker v. Sauvinet, 92 U. S., 90.
> Munn v. Illinois, 94 U. S., 113.
> McElrath v. United States, 102 U. S., 426.
> United States v. Cruikshank, 92 U. S. 542.
> Holmes v. Jennison, 14 Pet., 540.
> Presser v. Illinois, 116 U. S., 252.

Referring to the fourteenth amendment, the same author on p. 359, star p. 294, says:

> "The most important clause in the fourteenth amendment is that part of Sec. 1, which declares that all persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens of the United States, and of the State wherein they reside. This provision very properly puts an end to any question

> of the title of the freedmen and others of their race to the rights of citizenship; but it may be doubtful whether the further provisions of the same section surround the citizen with any protections additional to those before possessed under the State constitutions; though as a principle of state constitutional law has now been made a part of the Constitution of the United States, the effect will be to make the Supreme Court of the United States the final arbiter of cases in which a violation of this principle by state laws is complained of, inasmuch as the decisions of the state courts upon laws which are supposed to violate it will be subject to review in that court on appeal."

This distinction is referred to as being in line with the decisions of this court, to which we shall hereafter refer.

And again, in discussing the meaning to be attached to the phrase "privileges and immunities" as used in the fourteenth amendment, the same author, p. 491, star. p. 397, says:

> "Although the precise meaning of 'privileges and immunities' is not very conclusively settled as yet, it appears to be conceded that the Constitution secures in each State to the citizens of all other States, the right to remove to, and carry on business

therein; the right by the usual modes to acquire and hold property therein, and to protect and defend the same in law; the right to the usual remedies for the collection of debts and the enforcement of other personal rights; and the right to be exempt, in property and person, from taxes or burdens which the property, or persons, of citizens of the same State are not subject to. To this extent, at least, discrimations could not be made by State laws against them. But it is unquestionable that many other rights and privileges may be made—as they usually are—to depend upon actual residence; such as the right to vote, to have the benefit of exemption laws, to take fish in the waters of the State, and the like. * * * * * It was not within the power of the States before the adoption of the fourteenth amendment to deprive citizens of the equal protection of the laws: but there were servile classes not thus shielded, and when these were made freemen, there were some who disputed their claim to citizenship and some State laws were in force which established discriminations against them. To settle doubts and preclude all such laws, the fourteenth amendment was adopted: and the same securities which one citizen may demand, all others are now entitled to."

In re Kemmler, 136 U. S., 448, the court, speaking through Mr. Chief Justice Fuller, declared:

> "The fourteenth amendment did not radically change the whole theory of the relations of the state and federal governments to each other, and of both governments to the people. The same person may be at the same time a citizen of the United States and a citizen of a State. Protection to life, liberty and property rests primarily with the States, and the amendment furnishes an additional guarantee against any encroachment by the States upon those fundamental rights which belong to citizenship, and which the state governments were created to secure. The privileges and immunities of citizens of the United States, as distinguished from the privileges and immunities of citizens of the States, are indeed protected by it, but those are privileges and immunities arising out of the nature and essential character of the national government, and guaranteed and secured by the Constitution of the United States."

The first time this court was called upon to construe the provisions of the fourteenth amendment was in the Slaughter House cases, supra. Mr. Justice Miller, speaking for the court, said:

"It is quite clear, then, that there is a citizenship of the United States, and a citizenship of a State, which are distinct from each other, and which depend upon different characteristics or circumstances of the individual.

We think this distinction, and its explicit recognition in this amendment, of great weight in this argument, because the next paragraph in this same section, which is the one mainly relied upon by the plaintiff in error, speaks only of privileges and immunities of citizens of the United States, and does not speak of those of citizens of the several States. The argument, however, in favor of the plaintiff rests wholly on the assumption that the citizenship is the same, and the privileges and immunities granted by the clause are the same.

The language is 'no State shall make or enforce any law which will abridge the privileges and immunities of a *citizen of the United States*.' It is a little remarkable if this clause was intended as a protection to the citizen of a State against the legislative power of his own State, that the word citizen of the State should be left out when it is so carefully used, and used in contradistinction to citizens of the United States, in the very sentence which precedes it. It is too clear for argument that the change in phraseo-

> logy was adopted understandingly, and with a purpose.
>
> Of the privileges and immunities of a citizen of the United States, and of the privileges and immunities of a citizen of the States, and what they respectively are, we will presently consider. But we shall state here that it is only the former which are placed, by this clause, under the protection of the Federal Constitution, and that the latter, whatever they may be, are not intended to have any additional protection by this paragraph of the amendment. If then, there is a difference between the privileges and immunities belonging to a citizen of the United States as such, and those belonging to a citizen of a State as such, the latter must rest for their security and protection where they have heretofore rested, if they are not embraced by this paragraph of the amendment."

And further on in the same opinion the learned Justice continues:

> "It would be the vainest show of learning to attempt to prove by citations of authority that up to the adoption of the recent amendments, no claim or pretense was set up that those rights, (privileges and immunities of citizens of the States) depended on the Federal government for their

> existence and protection, beyond the very few express limitations which the Federal Constitution imposed upon the States; such for instance, as the prohibition against ex post facto laws, bills of attainder, and laws impairing the obligation of contracts. * * * But with the exception of these and a few other restrictions, the entire domain of the privileges and immunities of citizens of the States, as above defined, lay within the constitutional and legislative power of the States, and without that of the Federal government. Was it the purpose of the fourteeenth amendment, by the simple declaration that no State should make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, to transfer the security and protection of all the civil rights which we have mentioned, from the States to the Federal government? And where it is declared that Congress shall have the power to enforce that article, was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States?"

In Missouri v. Lewis, 101 U. S., 22, the plaintiff in error contended that the judicial system of Missouri was in conflict with the fourteenth amendment to the Constitution of the United

States, because it denied to suitors in the courts of St. Louis and other counties named, the equal protection of the laws, in that it denied to them the right of appeal to the Supreme Court of Missouri in cases where it gives that right to suitors in the courts of the other counties of the State.

After commenting upon the effect which should be given to the fourteenth amendment respecting the subject matter, Mr. Justice Bradley, speaking for the court, said:

> "We might go still further, and say with entire truth that there is nothing in the Constitution to prevent any State from adopting any system of laws or judicature which it sees fit, for all or any part of its territory. If the State of New York, for example, should see fit to adopt the civil law and its methods of procedure for New York City, and the surrounding counties, and the common law and its methods of procedure for the rest of the State, there is nothing in the Constitution of the United States to prevent it from so doing."

And further on in the opinion he says:

> "The fourteenth amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in this respect may

> exist in two States separated only by an imaginary line; on one side of this line there may be a right of trial by jury, and on the other side no such right. Each State prescribes its own modes of judicial procedure."

And the court further says, (p. 32):

> "If a Mexican state should be acquired by treaty, and added to an adjoining state or part of a state in the United States, and the two should be erected into a new state, it cannot be doubted that such new state might allow the Mexican laws and judicature to continue in one portion, and the common law and its corresponding judicature in the other portion. Such an arrangement would not be prohibited by any fair construction of the fourteenth amendment."

If any of the rights, privileges and immunities guaranteed by the fifth, sixth and seventh amendments to the Federal Constitution are such rights, privileges and immunities of national citizenship as the States are forbidden by the fourteenth amendment to abridge, then it necessarily follows that all the rights, privileges and immunities enumerated in these several amendments would come within such inhibition. So, too, the con-

verse of this proposition would be true, and none of such rights, privileges and immunities enumerated therein could be regarded as coming within the provisions of the fourteenth amendment. They are all alike. and all involve the same principle. Whatever of argument or authority that is applicable to one, to show that the rights, privileges and immunities it contains are not such as the states are forbidden to abridge, are equally applicable to all.

If it has been decided, since the adoption of the fourteenth amendment that the provisions of the seventh amendment do not apply to state courts, then we submit that such decisions are authority in support of the doctrine that the provisions of the fifth and sixth amendments are limitations upon Federal powers only, and not limitations upon the powers of the States. There are a number of such decisions, which not only re-affirm prior decisions as to the scope and effect of the first eight amendments, but in considering the construction to be placed upon the fourteenth amendment, this court has repeatedly held that the rights, privileges and immunities guaranteed by the first eight amendments to the Federal Constitution are not such rights, privileges or immunities of national citizenship as the states are for-

bidden by the fourteenth amendment to the Constitution of the United States to abridge.

In Edwards v. Elliott, 21 Wall., 532, it was held that the provisions of the seventh amendment to the Constitution, which secures to every party the right to trial by jury where the amount in controversy exceeds twenty dollars, does not apply to trials in state courts.

In Walker v. Sauvinet, 92 U. S., 90, which involved the same question as in the last case cited, Mr. Chief Justice Waite uses this language:

> "By Article 7 of the amendments, it is provided that 'In suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved.' This, as has been many times decided, relates only to trials in the courts of the United States." [Citing.]
>
> Edwards v. Elliott, 21 Wall., 557.

> "The States, so far as this amendment is concerned, are left to regulate trials in their own courts in their own way. A trial by jury in suits at common law, pending in State courts is not, therefore, a privilege or immunity of national citizenship which the States are forbidden by the fourteenth amendment to abridge. A state can-

> not deprive a person of his property without due process of law, but this does not necessarily imply that all trials in the state courts affecting the property of persons must be by jury. This requirement of the Federal Constitution is met if the trial is due according to the settled course of judicial proceedings."

In Pearson v. Yewdall, 95 U. S., 294, the chief justice again says:

> "We have held over and over again that Article 7 of the amendments to the Constitution of the United States relating to trials by jury, applies only to courts of the United States."

In line with this doctrine, is the case of Spies vs. Illinois, 123 U. S. 166, in which the court says:

> "That the first ten articles of amendment were not intended to limit the powers of state governments in respect to their own people, but to operate on the national government alone was decided more than one-half a century ago, and that decision has been steadily adhered to since."

If, in the light of the foregoing authorities, there still could be any question that the first eight amendments to the Constitution have been

held by this court to be limitations upon Federal powers only, and that the provisions of the fourteenth amendment do not render them applicable to States, such question is effectually settled in Ellenbecker v. Plymouth County, 134 U. S., 31.

This was a writ of error to the Supreme Court of the State of Iowa, and involved the legality of a judgment imposing a fine of five hundred dollars and costs, on each of the six plaintiffs in error, and imprisonment in the jail of Plymouth County for a period of three months, as a punishment for contempt in refusing to obey a writ of injunction issued by the court.

The errors assigned were:

1. That the Supreme Court of Iowa failed to give effect to Clause 3 of Sec. 2 of Art. 3 of the Constitution of the United States, which provides that the trial of all crimes, except in cases of impeachment, shall be by jury. Also to the provisions of Art. 6 of the amendments to the Constitution, which provide that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury.

2. That the Supreme Court erred in holding that the plaintiff could be fined and imprisoned without first being presented by a grand jury, and could be tried on ex parte affidavits, which decision

it was said is in conflict with, and contrary to the provisions of both Articles 5 and 6 of the amendments to the Constitution of the United States. The latter of which provides that in all criminal prosecutions the accused shall enjoy the right to be confronted by the witnesses against him.

4. That the Supreme Court erred in not holding that the laws of Iowa were in conflict with Art. 8 of the amendments to the Constitution of the United States, which provides that excessive fines shall not be imposed, nor cruel and unusual punishments inflicted.

Mr. Justice Miller, speaking for the court in disposing of these three assignments of error, says:

> "The first three of these assignments of error, as we have stated them, being the first, second and fourth assignments, as numbered in the brief of the plaintiff in error, are disposed of at once by the principle often decided by this court, that *the first eight articles of the amendments to the Constitution have reference to the powers exercised by the government of the United States and not to those of the States.*
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> Livingston v. Moore, 7 Peters, 469.
> The Justices v. Murray, 9 Wall, 274.

Edwards v. Elliott, 21 Wall, 532.
United State v. Cruikshank, 92 U. S., 542.
Walker v. Sauvinet, 92 U. S., 90.
Fox v. Ohio, 5 How, 410.
Holmes v. Jennison, 14 Pet., 540.
Presser v. Illinois, 116 U. S., 252."

Further on the learned justice says:

> "The limitations, therefore, of Articles five and six and eight of those amendments, being intended exclusively to apply to the powers exercised by the government of the United States, whether by Congress or by the judiciary, and not as limitations upon the powers of the States, can have no application to the present case."

The above authorities conclusively show that the rights, privileges and immunities guaranteed by the fifth and sixth amendments to the Federal Constitution are not such rights, privileges or immunities of national citizenship as the States are forbidden by the fourteenth amendment to abridge.

A careful examination of the decisions of this court clearly show the theory upon which they are based, and the distinctions which are therein made

between the privileges and immunities of citizens of the States and those of the United States. That the protection of the former rests primarily with the States, while those of the latter rest with the United States. That while the privileges and immunities of citizens of the United States, as distinguished from the privileges and immunities of citizens of the states, are protected by the fourteenth amendment, it must be remembered that they are only such privileges and immunities as arise out of the nature and essential character of national government. This line of distinction has been clearly marked along the boundaries of their respective spheres of action, and the two classes are as different in their natures as are the functions of their respective governments. Among the rights accorded to a citizen of the United States as such may be mentioned that of participating in foreign and inter-state commerce, the right to have the benefit of the postal laws, to make use, in common with others, of the navigable waters of the United States, to pass from state to state, and into foreign countries, because over all these subjects the jurisdiction of the United States extends, and they are covered by its laws.

Story on the Constitution, (4th Ed.) Sec. 1937.

So too, a citizen of the United States, as such, has the right to petition the Federal Government in respect to any matter of public concern; he may also examine public records of Federal jurisdiction, and visit the seat of government without being subjected to the payment of a tax for the privilege.

Crandall v. Nevada, 6 Wall., 35.

He may become the purchaser of public lands on the same terms with others; may participate in the government, if he comes within the conditions of sufferage, and may demand the care and protection of the United States when on the high seas or within the jurisdiction of a foreign government.

Slaughter House Cases, 16 Wall., 36.

Wherever it is the duty of the United States to give protection to a citizen against harm, inconvenience, or deprivation, the citizen is entitled to an immunity which pertains to Federal citizenship. The general rule respecting privileges and immunities of a citizen of the United States is said to be that whatever one may claim as of right under the Constitution and laws of the United

States by virtue of his citizenship as such, is a privilege of citizenship of the United States, and that whatever the Constitution and laws of the United States entitle him to exemption from, he may claim an immunity in respect thereto.

Slaughter House Cases, 16 Wall., (supra).

Counsel for plaintiff in error, in his brief, speaks of "a wild and untamed spirit of innovation in respect to juries," which he says took possession of the Territorial legislature, and lasted until this court had an opportunity of wiping it out, and that the framers of the Constitution incorporated the heresy in the Constitution. He also challenges the correctness of the statement of the Supreme Court of this State in which it said that the system of twelve jurors in criminal cases not capital, and in civil cases has been discarded in many of the states, and that this change had been sustained by decisions of high authority. Counsel professes his inability to find any such authority. We direct his attention to the case of Gibson v. State, 16 Fla., 291, which sets forth the constitutional provisions of that State adopted in 1875, and the statutory provisions subsequently enacted by the legislature in pursuance thereof,

providing that the number of jurors in all cases other than capital should be six, and upholding a conviction by such a jury, in which that court used substantially the same language as that employed by the Supreme Court in this case. This decision appears to have stood unchallenged for a period of something like twenty years without any citizen of that State having appealed to this court to check the "wild and untamed spirit of innovation in respect to juries," which counsel has seen fit to apply disparagingly to the legislative and judicial departments of the State of Utah.

III.

That Sec. 10 of Art. 1 of the Constitution of the State of Utah, which provides that in courts of general jurisdiction, except, in capital cases, a jury shall consist of eight jurors, does not infringe that clause of the Fourteenth Amendment to the Constitution of the United States relating to "due process of law."

Perhaps no provision of the Federal Constitution has afforded more numerous and important questions for adjudication by the courts than those contained in the Fifth and Fourteenth Amendments relating to "due process of law," and none more difficult of exact and satisfactory definition.

No proposition of law is better settled by judicial determination than that a state may dispense with a grand jury and prosecute for felonies by information instead of by indictment and that this is "due process of law" as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

In view of the fact that counsel for plaintiff in error concedes that this court has so decided, we do not deem it necessary to submit any argument or authorities in support thereof.

The constitutional provision of which the plaintiff in error complains is Sec. 10 of Art. 1, which reads as follows:

> "In capital cases the right of trial by jury shall remain inviolate. In courts of general jurisdiction, except in capital cases, a jury shall consist of eight jurors. In courts of inferior jurisdiction, a jury shall consist of four jurors. In criminal cases the verdict shall be unanimous."

Plaintiff in error contends that this provision violates that provision of the Fourteenth Amendment to the Federal Constitution which provides:

> "Nor shall any state deprive any person of life, liberty, or property without due process of law."

Mr. Justice Matthews, in Hurtado v. California, 110 U. S., 90, in an exhaustive opinion, reviews the authorities from the time of Magna Charta to the present time, as to what is granted by "the law of the land," or "due process of law," which are held to mean the same thing, and he concludes, that:

> 'Any legal procedure enforced by public authority, whether sanctioned by age or custom, or any new law devised in the discretion of the legislative power, in furtherance of the general public good, which requires an observation of these principles of liberty and justice, must be held to be 'due process of law.'"

In that case, this court was called upon for the first time to decide the question as to whether or not a state could prosecute for a capital or otherwise infamous crime, by information instead of by indictment. The Constitution of the State of California, adopted in 1879, in Art. I, Sec. 8, provided that offenses theretofore required to be prosecuted by indictment, should be prosecuted by information, after examination and comittment. Hurtado had been prosecuted in this manner, and convicted of a capital offense. He contended that he had been condemned without "due process of law," and sued out a writ of error from this court

to the Supreme Court of California. He based his claim upon the provisions of the fourteenth amendment.

In Walker v. Sauvinet, supra, the same doctrine is reaffirmed; also in Dent v. West Va., 129 U. S., 114.

Chancellor Kent, (2 Comm.) 13, says that:

> "The better and larger definition of 'due process of law,' is that it means law in its regular course of administration through courts of justice."

The definition given by Mr. Webster in Dartmouth College v. Woodward, 4 Wheat., 519, (Wks. of Webster, Vol. 5, p. 487,) as to what is meant by due process of law, or the law of the land, is stated and approved by Mr. Cooley in his work on Constitutional Limitations, (5th Ed.) 432, star page 354, and is also cited and approved in a large number of cases decided by this court.

> "By the law of the land," says Mr. Webster, "is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property and immuities under

> the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not therefore to be considered the law of the land."

Mr. Justice Johnson, in the Bank of Columbia v. Okley, 4 Wheat. 235, says:

> "As to the words of Magna Charta after volumes spoken and written with a view to their exposition, the good sense of mankind has at last settled down to this: That they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice."

The term "due process of law" has been defined to mean a course of legal proceedings according to those rules and principles which have been established by our jurisprudence for the protection and enforcement of private rights.

Pennoyer v. Neff, 95 U. S., 714.

Kennard v. Louisiana, 92 U. S., 480.

Hagar v. Reclamation Dist., 111 U. S.,701.

Also any law which operates on all alike, and does not subject the individual citizen to the arbi-

trary exercise of the powers of government, is due process of law within the meaning of the fourteenth amendment to the Constitution.

In re Converse, 137 U. S., 624.
Giozza v. Tiernan, 148 U. S., 657.
Duncan v. Missouri, 152 U. S., 377.
Missouri Pac. R. R. Co. v. Mackey, 127 U. S., 205.
Minneapolis & St. L. R. R. Co. v. Herrick, id. 210.
Leeper v. Texas, 139 U. S., 462.
Barbier v. Connolly; 113 U. S., 27.

A statute which authorizes a person indicted for murder to plead guilty, and empowers the court to determine the degree does not infringe the due process of law clause of the Fourteenth Amendment.

Hallinger v. Davis, 146 U. S., 314.

The words, "due process of law," in the fourteenth amendment, do not necessarily require an indictment by a grand jury in a prosecution by a state for murder, whose constitution authorizes such prosecution by information.

Hurtado v. California (supra).
McNulty v. California, 149 U. S., 645.
Hodgson v. Vermont, 168 U. S., 262.

Many other authorities might be cited in which due process of law is defined, but we do not deem it necessary to extend the list. In the light of those we have cited, and of the settled and approved definitions as to what constitutes due process of law, we may conclude that it does not alone consist in those settled usuages and means of proceeding, existing in the common law of England before the immigration of our ancestors, or even at the time of the adoption of the Federal Constitution. To hold that such characteristics are essential to due process of law, as has been well stated by Mr. Justice Matthews, in Hurtado V. California, supra, would be to deny every quality of the law but its age, and to render it incapable of progress or improvement. It would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians. While we should not be wanting in veneration and respect for those principles which have come down to us from Magna Charta, and the com-

mon law of England, hallowed as they are by time and immemorial usuage, and, by universal consent, adjudged to be the overshadowing factor in causing the Anglo-Saxon to be the foremost race, and to represent the highest and most advanced civilization of the present age, we should not, on the other hand, lose sight of the fact that all law is but the outgrowth of human experience and advancement. For several hundred years, under the common law of England, a man could not testify in his own behalf when accused of crime, though not to be permitted to do so often meant condemnation and death. For many centuries, and up to a comparatively recent date, under the laws of England, more than one hundred offenses were punishable by death. Even in America, death for so-called witchcraft has been inflicted. All this was done when we possessed "the sacred heritage from the ruins of tyranny"—the right to trial by a common law jury. Who can say that we have reached a position from which no further development can be made, providing it is made along the line of experience, and in harmony with the great and immutable principles of justice.

The law under which petitioner was convicted is a general law; a law which hears before it condemns; which proceeds upon inquiry and renders

judgment only after trial. Under this law the plaintiff in error was accorded the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, and to have compulsory process to compel the attendance of witnesses in his own behalf; to have a speedy public trial by an impartial jury of the county or district in which the offense is allged to have been committed, and the right of appeal in all cases.

All of the safeguards thrown about the selection and empaneling of a jury, are required to be observed by this law; and, in every respect, save only that the Constitution fixes the number of jurors at eight instead of twelve, does it conform to the requirements of the common law. Is the supreme law of a sovereign state void for this reason?

Adopting the language of Mr. Justice Matthews in Hurtado v. California, supra, with entire confidence we assert that the proceeding by which petitioner was tried and convicted in this case was a "legal proceeding enforced by public authority," and although not sanctioned by age, it was "newly devised in the discretion of the legislative power

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to be due process of law."

Respectfully submitted,

ALEXANDER C. BIS

Attorne

WILLIAM A. LEE,

Deputy Attorney General.

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